

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-900

COMMONWEALTH

vs.

L.M.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial, the defendant was convicted of violating an abuse prevention order pursuant to G. L. c. 209A, § 7. He appeals, claiming that the judge's failure to, sua sponte, give a specific unanimity instruction created a substantial risk of a miscarriage of justice. We affirm.

Background. The jury could have found the following facts. On April 18, 2017, the victim sought and received an abuse prevention order pursuant to G. L. c. 209A, which restricted the defendant, in pertinent part, from contacting the victim "either directly or through someone else." After a hearing on May 2, 2017, the order was extended for one year. On July 3, 2017, the victim was out of town, but returned to her home the next morning to find a text message from her friend B.M., sent the prior night, detailing her interaction with the defendant at a

fireworks display. B.M. testified that the defendant told her "just tell her [the victim] I want to see my son," to which B.M. responded she would tell the victim, and let him know what the victim said. After reading the text message from B.M., the victim went to the police station to report the incident, because she thought the alleged third-party contact was a direct violation of the restraining order.

At trial, the prosecutor introduced testimony from two additional witnesses. One witness, K.C., provided an account of the evening, having been in close proximity to B.M. for the duration of her conversation with the defendant when the alleged third-party contact occurred. The other witness, M.K.M., testified about her interactions with the defendant on his way to the fireworks around 8:30 P.M.

Discussion. Specific unanimity instruction. The defendant contends, for the first time on appeal, that he was entitled to a specific unanimity instruction. As he did not request such an instruction, and did not object to the jury instructions as given, our review is limited to whether the error, if any, created a substantial risk of a miscarriage of justice.

Commonwealth v. Erazo, 63 Mass. App. Ct. 624, 630 (2005).

The defendant contends the judge erroneously gave a general unanimity instruction when a specific unanimity instruction was required. We disagree. A specific unanimity instruction is

required "only if there are separate events or episodes and the jurors could otherwise disagree concerning which act a defendant committed and yet convict him of the crime charged."

Commonwealth v. Thatch, 39 Mass. App. Ct. 904, 904 (1995). This type of instruction is warranted when the prosecutor, on a single charged offense, presents evidence of "separate, discrete incidents, any one of which would suffice by itself to make out the crime charged." Commonwealth v. Shea, 467 Mass. 788, 798 (2014).

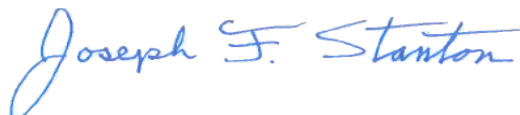
Here, because the Commonwealth did not proceed on alternate theories of how the defendant violated the order, a specific unanimity instruction was not required. The Commonwealth's theory of the case was that the defendant violated the order by indirectly contacting the victim through B.M. Indeed, in closing argument, the prosecutor argued that the only violation was when the defendant indirectly contacted the victim through B.M. The documentary evidence at trial was limited to the abuse prevention order and the text message from B.M. to the victim. The testimony of the two additional witnesses served to corroborate the defendant's conduct and demeanor, and was not offered as an additional basis for the violation.

The judge instructed the jury that their verdict must be unanimous. "A general unanimity instruction informs the jury

that the verdict must be unanimous, whereas a specific unanimity instruction indicates to the jury that they must be unanimous as to which specific act constitutes the offense charged." Shea, 467 Mass. at 797-798, quoting Commonwealth v. Conefrey, 420 Mass. 508, 512 (1995). In addition, the judge instructed the jury on permissible inferences, and specifically pointed to the testimony of B.M. and the text message. The jury are presumed to follow the instructions given. Commonwealth v. Cheremond, 461 Mass. 397, 414 (2012). There was no error, let alone a substantial risk of a miscarriage of justice.

Judgment affirmed.

By the Court (Blake,
Ditkoff & Hand, JJ.¹),



Clerk

Entered: October 29, 2019.

¹ The panelists are listed in order of seniority.